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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re:	:	Chapter 11
CIRCUIT CITY STORES, iNC., et al.,	:	Case No. 08-35653 (KRH)
Debtors.	:	Jointly Administered

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO CERTAIN CLAIMS SUBJECT TO (I) THE DEBTORS' NINETEENTH OMNIBUS OBJECTION TO CLAIMS (RECLASSIFICATION OF CERTAIN MISCLASSIFIED CLAIMS TO GENERAL UNSECURED, NON-PRIORITY CLAIMS) AND (II) THE DEBTORS' THIRTY-THIRD OMNIBUS OBJECTION TO CLAIMS (MODIFICATION AND/OR RECLASSIFICATION OF CERTAIN CLAIMS)

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INTRODUCTION

The debtors and debtors in possession in the above-captioned cases (collectively, the "Debtors"), pursuant to Rules 3007, 7056, and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Rule 56 of the Federal Rules of Civil Procedure (the "Civil Rules"), submit this memorandum of law in support of their motion for summary judgment (the "Summary Judgment Motion") on the Nineteenth and Thirty-Third Omnibus Objections (the "Objections")[1] with respect to Reclamation Claims (as defined herein) asserted by LumiSource, Cisco-Linksys, Paramount, Seagate, Denon, Plantronics, and Boston Acoustics (each as defined herein, and collectively the "Respondents").

PRELIMINARY STATEMENT

By the Objections, the Debtors seek to reclassify each Reclamation Claim from an administrative priority or secured claim to a pre-petition general unsecured, non-priority claim. Each Respondent has contested the Objections, arguing that its respective Reclamation Claim

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Nineteenth Omnibus Objection and the Thirty-Third Omnibus Objection (each as defined below).

is either a secured claim or entitled to priority under Bankruptcy Code section 546(c).

As demonstrated below, each Reclamation Claim is, as a matter of law, however, a pre-petition general unsecured, non-priority claim for two reasons. First, under the clear and unambiguous language of Bankruptcy Code section 546(c), the Respondents only recourse upon the Debtors filing petitions for relief was to seek to reclaim their goods. See 11 U.S.C. § 546(c). None of the respondents, however, pursued that remedy and their failure to do so resulted in their respective Reclamation Claims being nothing more than pre-petition general unsecured, non-priority claims.

Second, on the Petition Date, all of the Debtors' "inventory", including the goods the Respondents requested to reclaim, were "subject to" good, valid and fully perfected and enforceable floating liens held by the Debtors' Pre-petition Lenders (as defined herein), which floating liens were satisfied by the Debtors' DIP Lenders (as defined herein) who provided the Debtors with debtor in possession financing under the DIP Facility (as defined herein) itself secured by floating liens on all of the Debtors' inventory. Therefore, because the Respondents'

Reclamation Claims were individually and collectively less than the value of Pre-petition Lenders and DIP Lenders loans, the Reclamation Claims were mere pre-petition general unsecured non-priority claims, not secured or administrative expense claims. See In re Dana Corp., 367 B.R. 409, 421 (Bankr. S.D.N.Y. 2007) (concluding that "the Reclamation Claims are valueless").

Accordingly, the Summary Judgment Motion should be granted, and the Reclamation Claims should be reclassified as pre-petition general unsecured, non-priority claims.

PROCEDURAL BACKGROUND

On June 22, 2009, the Debtors filed the Debtors' Nineteenth Omnibus Objection to Claims (Reclassification of Certain Misclassified Claims to General Unsecured, Non-Priority Claims) (D.I. 3703; the "Nineteenth Omnibus Objection"). By the Nineteenth Omnibus Objection, the Debtors sought to reclassify certain filed claims to pre-petition general unsecured, non-priority claims.

Responses to the Nineteenth Omnibus Objection were filed by, among others, LumiSource, Inc. ("LumiSource" and its response, D.I. 4122; the "LumiSource Response"), Cisco-Linksys LLC ("Cisco-Linksys" and its response, D.I.

4120; the "Cisco-Linksys Response"), Paramount Home Entertainment Inc. ("Paramount" and its response, D.I. 4154; the "Paramount Response"), Seagate Technology LLC ("Seagate" and its response, D.I. 4115; the "Seagate Response"), Denon Electronics (USA) LLC ("Denon" and its response, D.I. 4148; the "Denon Response"), and Plantronics Inc. ("Plantronics" and its response, D.I. 4118; the "Plantronics Response").

On August 20, 2009, the Debtors filed the Debtors' Thirty-Third Omnibus Objection to Claims (Modification and/or Reclassification of Certain Claims) (D.I. 4590; the "Thirty-Third Omnibus Objection"). By the Thirty-Third Omnibus Objection, the Debtors sought to reclassify certain claims to pre-petition general unsecured, non-priority claims.

Boston Acoustics, Inc. ("Boston Acoustics") filed a response to the Thirty-Third Omnibus Objection (D.I. 4850; the "Boston Acoustics Response", and collectively with the Responses to the Nineteenth Omnibus Objection, the "Responses").

STATEMENT OF MATERIAL FACTS

The following material facts are not in dispute:

A. The Pre-Petition And DIP Facilities.

On or about January 31, 2008, certain Debtors, including Circuit City Stores, Inc. ("Circuit City"), entered into a revolving credit facility (the "Pre-petition Credit Facility") with Bank of America, N.A., as agent (together with the lenders under the Pre-petition Credit Facility, the "Pre-petition Lenders") pursuant to Pre-petition Credit Agreement.[2] Final DIP Order[3] ¶ F. Under the Pre-petition Credit Facility, the Pre-petition Lenders advanced loans secured by first priority liens on substantially all of the Debtors' assets. See the Besanko Declaration[4] at p. 5. The Pre-petition Lenders' collateral

[2] "Pre-Petition Credit Agreement" means the Second Amended and Restated Credit Agreement dated as of January 31, 2008, as well as all related documents and agreements, including the Amended and Restated Security Agreement (the "Pre-petition Security Agreement").

[3] "Final DIP Order" means the Final Order Pursuant to 11 U.S.C. Sections 105, 361, 362, 363 and 364 and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (1) Authorizing Incurrence by the Debtors of Post-Petition Secured Indebtedness with Priority Over All Secured Indebtedness and with Administrative Superpriority, (2) Granting Liens, (3) Authorizing Use of Cash Collateral by the Debtors Pursuant to 11 U.S.C. Section 363 and Providing for Adequate Protection and (4) Modifying the Automatic Stay (D.I. 1262).

[4] "Besanko Declaration" means the Corrected Declaration of Bruce H. Besanko, Executive Vice President and Chief Financial Officer of Circuit City Stores, Inc. in Support of Chapter 11 Petitions and First Day Pleadings (D.I. 79).

included, among other collateral, all existing and after-acquired inventory and the proceeds thereof. See Interim DIP Order[5] ¶ E(iii) (finding that the Pre-petition Lenders had a security interest and liens on among other things, the Debtors' "inventory" and the proceeds thereof; Final DIP Order ¶ F(iii) (same); see also Circuit City Stores, Inc., Current Report (Form 8-K), at Item 1.01 (Feb. 6, 2008) (stating that the Pre-petition Credit Agreement would be "secured primarily by the Company's inventory and credit card receivables").

On November 10, 2008 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11, Unite States Code (the "Bankruptcy Code"). As of the Petition Date, approximately $898 million was outstanding under the Pre-petition Credit Facility. See Besanko Declaration at p. 5; see also Final DIP Order ¶ F(ii). In connection with their bankruptcy filings, the

[5] "Interim DIP Order" means the "Interim DIP Order" means the Interim Order Pursuant to 11 U.S.C. Sections 105, 361, 362, 363 and 364 and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (1) Authorizing Incurrence by the Debtors of Post-Petition Secured Indebtedness with Priority over all Secured Indebtedness and with Administrative Superpriority, (2) Granting liens, (3) Authorizing Use of Cash Collateral by the Debtors Pursuant to 11 U.S.C. Section 363 and Providing for Adequate Protection, (4) Modifying the Automatic Stay and (5) Scheduling a Final Hearing (D.I. 78; the "Interim DIP Order").

Debtors sought authority to enter into a post-petition, debtor in possession, secured financing facility (the "DIP Facility") with Bank of America, N.A., as agent (together with the lenders under the DIP Facility, the "DIP Lenders") pursuant to the DIP Credit Agreement.[6] As was the case with the Pre-petition Credit Facility, all obligations under the DIP Facility were to be secured by substantially all of the Debtors' existing and after acquired assets, including "inventory" and the proceeds thereof. See Interim DIP Order ¶ 2(f); Final DIP Order ¶ 2(e).

Importantly, pursuant to this Court's Interim and Final DIP Orders, the Debtors were authorized, among other things, to repay all outstanding obligations under the Pre-petition Credit Facility. See Interim DIP Order ¶ 2(c); see also Final DIP Order ¶ 2(c). Consequently, on November 12, 2008, the Debtors repaid all of the outstanding obligations under the Pre-petition Credit Facility. See Circuit City Stores, Inc., Current Report (Form 8-K), at Item 1.01 (Nov. 12, 2008) (noting that all obligations under the Pre-petition Credit Agreement, "including

[6] "DIP Credit Agreement" means that certain Senior Secured, Super-Priority, Debtor-in-Possession Credit Agreement dated November 12, 2008, as subsequently modified, amended, or supplemented, and as approved by the Interim and Final DIP Orders.

outstanding borrowings as of November 12, 2008, have been subsumed under the DIP Credit Agreement").

B. The Reclamation Procedures Order.

During the "first day" hearing in these cases, the Court not only approved the DIP Facility on an interim basis, but also approved certain reclamation procedures on an interim basis. See Interim Reclamation Procedures Order.[7] After a hearing on December 5, 2008, the Court entered a final order with respect to reclamations procedures (D.I. 897, the "Reclamation Procedures Order"). See Reclamation Procedures Order.

Pursuant to the Reclamation Procedures Order, claimants seeking to reclaim goods were required to file reclamation demands no later than twenty days following the Petition Date. Each reclamation demand had to include, among other information, the information required by Bankruptcy Code section 546(c).

[7] "Interim Reclamation Procedures Order" means Interim Order Under Bankruptcy Code Sections 105(a), 362, 503(b), 507(a), 546(c), and 546(h) (I) Granting Administrative Expense Status to Obligations from Postpetition Delivery of Goods; (II) Authorizing Payment of Expenses in the Ordinary Course of Business; (III) Authorizing Debtors to Return Goods; and (IV) Establishing Procedures for Reclamation Demands (D.I. 133, the Interim Reclamation Procedures Order").

As part of the approved reclamation procedures, the Debtors were required to advise each reclamation claimant of the allowed amount, if any, of its reclamation demand on or before the day that was one hundred and twenty (120) days following the Petition Date (the "Allowed Reclamation Amount"), and absent giving such notice, the Debtors were deemed to have rejected the reclamation demand. See Reclamation Procedures Order ¶ 5(c). None of the Respondents were sent a notice setting forth an Allowed Reclamation Amount and, thus, all of their demands were deemed rejected on March 10, 2009.

Importantly, the Reclamation Procedures Order did not deny any request. Indeed, it expressly provided that:

> Nothing in this Order or the above procedures is intended to prohibit, hinder, or delay any Reclamation Claimant from asserting or prosecuting any of its rights to seek to reclaim goods provided to the Debtors, or affect, alter, diminish, extinguish, or expand the rights or interest, if any, to recover goods (or proceeds thereof) sought to be reclaimed.

Reclamation Procedures Order ¶ 6. This point was also made clear by counsel at the "first-day" hearing. See

Transcript of Hearing on November 10, 2008[8] at 84 (Debtors' counsel stating that if reclamation claimants wanted "to get [a] TRO and injunction in an adversary proceeding, . . . [the proposed Reclamation Procedures Order] doesn't preclude them from doing it"). Nonetheless, none of the Respondents commenced an adversary proceeding, filed a motion for relief from the automatic stay, or sought any other relief from this Court (or any other court, for that matter) to pursue their Reclamation Demand (as defined herein), other than sending its reclamation request or filing its Reclamation Claim (as defined herein).

C. The Alleged Reclamation Claims.[9]

1. The LumiSource Reclamation Claim.

On or about November 13, 2008, LumiSource sent a letter to the Debtors' claims and noticing agent, Kurtzman Carson Consultants ("KCC"), demanding the return of alleged goods in the amount of $235,200 (the "LumiSource Goods").

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[8] A true and correct copy of the Transcript of Hearing on November 10, 2008 is attached hereto as Exhibit A.

[9] As provided for in the Objections, the Debtors only sought to reclassify the Reclamation Claims to pre-petition general unsecured claims and did not otherwise seek to alter or modify such claims. Thus, for purposes of the Objections and the Summary Judgment Motion, the Debtors assume that the Reclamation Claims are otherwise valid, but reserve any and all rights to object to or otherwise challenge the Reclamation Claims at a later date.

LumiSource alleged that the LumiSource Goods were (i) "goods" within the meaning of the Uniform Commercial Code (the "U.C.C.") and (ii) received by Circuit City Stores, Inc. within 45 days prior to the Petition Date. As such, LumiSource demanded return of the LumiSource Goods (the "LumiSource Reclamation Demand").

Thereafter, on January 29, 2009, LumiSource filed a claim in the amount of $392,000.00, of which LumiSource asserted $235,200.00 was allegedly entitled to secured claim status pursuant to Bankruptcy Code section 546(c) (the "LumiSource Reclamation Claim"). The remaining $156,800.00 was classified on the proof of claim form as a general unsecured claim.

2. The Cisco-Linksys Reclamation Claim.

On or about November 10, 2008, Cisco-Linksys sent a letter to the Debtors' counsel, demanding the return of alleged goods in the amount of $7,453,957.38 (the "Cisco-Linksys Goods"). Cisco-Linksys alleged that the Cisco-Linksys Goods were (i) "goods" within the meaning of the U.C.C. and (ii) shipped to Circuit City Stores, Inc. and its affiliates within 53 days of the Petition Date. As such, Cisco-Linksys demanded return of the Cisco-Linksys Goods (the "Cisco-Linksys Reclamation Demand").

Thereafter, on January 21, 2009, Cisco-Linksys filed a claim in the amount of $8,287,653.95, of which Cisco-Linksys asserted $7,453,957.38 was allegedly entitled to secured claim or priority status pursuant to Bankruptcy Code sections 546(c) and 507(a)(2) (the "Cisco Linksys Reclamation Claim"). The remaining $833,696.57 was classified on the proof of claim form as a general unsecured claim.

3. The Paramount Reclamation Claim.

On or about November 12, 2008, Paramount sent a letter to the Debtors and the Debtors' counsel, demanding the return of alleged goods in the amount of $11,600,840.04 (the "Paramount Goods"). Paramount alleged that it was entitled to reclaim the Paramount Goods pursuant to the U.C.C. and the California Commercial Code. As such, Paramount demanded return of the Paramount Goods (the "Paramount Reclamation Demand").

Thereafter, on December 19, 2008, Paramount filed a claim in the amount of $3,201,013.37 asserting priority pursuant to Bankruptcy Code section 503(b)(9). On January 30, 2009, Paramount filed a claim in the amount of $16,497,463.67, of which Paramount asserted $14,801,853.41 was allegedly entitled to priority status pursuant to

Bankruptcy Code sections 546(c), 503(b)(9), and 507(a)(2) (the "Paramount Reclamation Claim"). The remaining $1,695,610.26 was classified as a general unsecured claim.

4. The Seagate Reclamation Claim.

On or about November 10, 2008, Seagate sent a letter to the Debtors' counsel, demanding the return of alleged goods in the amount of $130,920.00 (the "Seagate Goods"). Seagate alleged that the Seagate Goods were (i) "goods" within the meaning of the U.C.C. and (ii) were the subject of invoices dated within 50 days of the Petition Date. As such, Seagate demanded return of the Seagate Goods (the "Seagate Reclamation Demand").

Thereafter, on January 30, 2009, Seagate filed a claim in the amount of $1,765,132.70, of which Seagate asserted $130,920.00 was allegedly entitled to secured claim or priority status pursuant to Bankruptcy Code sections 546(c) and 507(a)(2), and $796,502.70 was entitled to administrative expense priority pursuant to Bankruptcy Code section 503(b)(1) (the "Seagate Reclamation Claim"). The remaining $864,710.05 was classified as a general unsecured claim.

5. The Denon Reclamation Claim.

On or about November 10, 2008, Denon sent a letter to the Debtors' Chief Financial Officer, Bruce H. Besanko ("Mr. Besanko"), demanding the return of alleged goods in the amount of $589,396.62 (the "Denon Goods"). Denon alleged that the Denon Goods were received by the Debtors within 45 days of the Petition Date. As such, Denon demanded return of the Denon Goods (the "Denon Reclamation Demand").

Thereafter, on December 19, 2008, Denon filed a claim in the amount of $589,396.62 asserting a secured claim or priority status pursuant to Bankruptcy Code section 546(c) (the "Denon Reclamation Claim").

6. The Plantronics Reclamation Claim.

On or about November 10, 2008, Plantronics, sent a letter to the Debtors and the Debtors' counsel, demanding the return of alleged goods in the amount of $21,594.00, which was later reduced to $20,062.40 (the "Plantronics Goods"). Plantronics alleged that the Plantronics Goods were (i) "goods" within the meaning of the U.C.C. and (ii) received by Circuit City Stores, Inc. and its affiliates prior to the Petition Date. As such, Plantronics demanded

return of the Plantronics Goods (the "Plantronic Reclamation Demand").

Thereafter, on January 21, 2009, Plantronics filed a claim in the amount of $376,818.62, of which Plantronics asserted $20,062.40 was allegedly entitled to secured or priority claim status pursuant to Bankruptcy Code sections 546(c) and 507(a)(2) and $296,365.00 was allegedly entitled to priority status under Bankruptcy Code section 507(a)(2) (the "Plantronics Reclamation Claim"). The remaining $60,391.22 was classified on the proof of claim form as a general unsecured claim.

7. The Boston Acoustics Reclamation Claim.

On or about November 10, 2008, Boston Acoustics sent a letter to Mr. Besanko, demanding the return of alleged goods in the amount of $187,454.84 (the "Boston Acoustics Goods").[10] Boston Acoustics alleged that the Boston Acoustics Goods were received by Circuit City Stores, Inc. and its affiliates within 45 days prior to the Petition Date. As such, Boston Acoustics demanded return

[10] Collectively with the LumiSource Goods, the Cisco-Linksys Goods, the Paramount Goods, the Seagate Goods, the Denon Goods, the Snell Acoustics Goods, and the Plantronic Goods, the "Alleged Goods".

of the Boston Acoustics Goods (the "Boston Acoustics Reclamation Demand").[11]

Thereafter, on January 30, 2009, Boston Acoustics filed a claim in the amount of $503,373.29 asserting $187,454.84 was allegedly entitled to administrative priority pursuant to Bankruptcy Code section 546(c) (the "Boston Acoustics Reclamation Claim").[12] The remaining $315,918.15 was classified on the proof of claim form as a general unsecured claim.

ARGUMENT

I. STANDARD FOR SUMMARY JUDGMENT.

Pursuant to section 502(a), a party in interest, including the debtor, may object to claims. See 11 U.S.C. § 502(a). In turn, Bankruptcy Rule 3007(a) provides that such objection must be in writing and filed with the Court. Fed. R. Bankr. P. 3007(a).

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[11] Collectively with the LumiSource Reclamation Demand, the Cisco-Linksys Reclamation Demand, the Paramount Reclamation Demand, the Seagate Reclamation Demand, the Denon Reclamation Demand, the Snell Acoustics Reclamation Demand, and the Plantronic Reclamation Demand, the "Reclamation Demands".

[12] Collectively with the LumiSource Reclamation Claim, the Cisco-Linksys Reclamation Claim, the Paramount Reclamation Claim, the Seagate Reclamation Claim, the Denon Reclamation Claim, the Snell Acoustics Reclamation Claim, and the Plantronic Reclamation Claim, the "Reclamation Claims".

Claim objections are contested matters pursuant to Bankruptcy Rule 9014. In re IBIS Corp., 272 B.R. 883, 893 (Bankr. E.D. Va. 2001) ("Objections to proofs of claims are contested matters governed by Fed. R. Bankr. P. 9014."). As in the case of all other contested matters, Bankruptcy Rule 7056, which incorporates Civil Rule 56, applies to claim objections. See Fed. R. Bankr. P. 9014(c).

Pursuant to Civil Rule 56(b), "[a] party against whom relief is sought may move at any time, with or without supportive affidavits, for summary judgment on all or part of the claim." Fed. R. Civ. P. 56(b). "Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." In re US Airways, Inc., No. 1:06CV539, 2006 WL 2992495, at *4 (E.D. Va. 2006) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1985)).

The United States Supreme Court has held that summary judgment is not a disfavored procedural shortcut, but rather an integral part of the Civil Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Sibley v. Lutheran Hosp. of Md., Inc., 871 F.2d 479, 483 n.9 (4th Cir.

1989) (citing Celotex, 477 U.S. at 327). In this regard, a court may properly grant summary judgment when:

> Although each side in its submissions has presented a different characterization of the facts . . . and has argued different conclusions which the court should draw from those facts, there is little dispute as to actual facts and no dispute of material facts relevant to the determination of the causes of action.

In re Conn. Pizza, Inc., 193 B.R. 217, 220 (Bankr. D. Md. 1996); see also Goodman v. Resolution Trust Corp., 7 F.3d 1123, 1124 (4th Cir. 1993) (finding that summary judgment is appropriately granted where there are "no relevant disputes of material fact" (emphasis added)).

II. THE RECLAMATION CLAIMS ARE GENERAL UNSECURED, NON-PRIORITY CLAIMS AS A MATTER OF LAW.

A. Bankruptcy Code Section 546(c)(1) Plainly And Unambiguously Only Granted The Respondents The Right To Reclaim Their Alleged Goods.

Bankruptcy Code section 546(c) provides as follows:

> Except as provided in subsection (d) of this section and in section 507(c), and subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 are subject to the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, within 45 days before the date of

> the commencement of a case under this title, but such seller may not reclaim such goods unless such seller demands in writing reclamation of such goods--
>
> (A) not later than 45 days after the date of receipt of such goods by the debtor; or
>
> (B) not later than 20 days after the date of commencement of the case, if the 45-day period expires after the commencement of the case.

11 U.S.C. § 546(c) (2009)(emphasis added).

Bankruptcy Code section 546(c)(1) is clear on its face. First, that section "does not give such a [reclamation] seller/creditor an administrative claim . . . ." See In re First Magnus Fin. Corp., 2008 WL 5046596, at *2 (Bankr. D. Ariz. Oct. 16, 2008) (emphasis added). Nor does it provide that a reclaiming seller holds a lien on the goods that are subject to a written reclamation demand. See 11 U.S.C. § 546(c)(1). It simply and unequivocally provides that a seller may reclaim goods, if, among other things, the seller provides a debtor with the required written demand. See 11 U.S.C. § 546(c)(1). Thus, there is simply no statutory basis for the Respondents' Reclamation Claims to be accorded administrative expense priority or treated as secured

claims. CSX Transp., Inc. v. Georgia State Bd. of Equalization, 552 U.S. 9, 20 (2007) (noting that where "the words of the statute are unambiguous, the judicial inquiry is complete." (quotation and citation omitted)).

B. The Respondents Reliance On Pre-BAPCPA Cases Is Misplaced.

Notwithstanding the above, the Respondents contend that their respective Reclamation Claims are entitled to administrative expense status or a junior lien.[13] In support, certain Respondents cite In re Georgetown Steel Co., LLC and Phar-Mor, Inc. v. McKesson Corp. In both cases, the courts concluded that, under section 546(c)(2), the reclaiming seller was entitled to administrative expense priority for its reclamation claim. Georgetown Steel, 318 B.R. 340, 351-52 (Bankr. D.S.C. 2004); Phar-Mor, 534 F.3d 502, 508 (6th Cir. 2008). The Respondents' reliance on these decisions, however, is misplaced because the decisions were interpreting the prior

[13] See LumiSource Response ¶ 6 (asserting a lien); Cisco-Linksys Response ¶ 7 (asserting secured creditor status); Paramount Response ¶ 14 (asserting a right to administrative expense status); Seagate Response ¶ 6 (asserting secured creditor status); Plantronics Response ¶ 6 (asserting secured creditor status); Boston Acoustics Response at ¶ 2 (asserting a right to administrative expense status). See, generally, Denon Response ¶ 1.

and no longer applicable[14] version of Bankruptcy Code section 546(c) and a misreading of the Reclamation Procedures Order.

Specifically, as this Court is well aware, Bankruptcy Code section 546(c) was amended as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Under pre-BAPCPA section 546(c), a reclaiming seller would be entitled to an administrative expense under Bankruptcy Code section 503(b) or a junior lien in certain circumstances. See 11 U.S.C. § 546(c)(2)(A), (B); see also Dana, 367 B.R. at 415 (collecting cases interpreting section 546(c)(2)). Specifically, pre-BAPCPA section 546(c)(2) provided, in pertinent part, as follows:

> (2) the court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if the court—
>
> (A) grants the claim of such a seller priority as a claim of a kind specified in section 503(b) of this title; or
>
> (B) secures such claim by a lien.

[14] The amended Bankruptcy Code section 546(c) applies to all cases filed on or after October 17, 2005. In re Tucker, 329 B.R. 291, 298 (Bankr. D. Ariz. 2005).

11 U.S.C. § 546(c)(2004)(emphasis added). Thus, under the pre-BAPCPA Bankruptcy Code section 546(c)(2), the Respondents could have properly asserted an administrative expense claim or a secured claim, if the Court denied their written demand and granted them an administrative claim or secured their claim with a lien. 11 U.S.C. § 546(c)(2)(A)-(B) (2004). Under BAPCPA, however, no such rights exist.

In particular, in the BAPCPA amendments to Bankruptcy Code section 546(c), Congress deleted subsection (c)(2) in its entirety and replaced it with the current statutory language. Compare, 11 U.S.C. § 546(c)(2) (2009) ("If the seller of goods fails to provide notice in the manner described in paragraph (1), the seller still may assert the rights contained in section 503(b)(9)"), with, 11 U.S.C. § 546(c)(2) (2004) ("the court may deny reclamation . . . only if the court — (A) grants the claim of such a seller priority as a claim of a kind specified in section 503(b) of this title; or (B) secures such claim by a lien."). In so doing, Congress clearly intended to eliminate any right to an administrative expense (other than under section 503(b)(9)) or a junior lien under section 546(c). See, e.g., U.S. Trustee v. Equip. Servs. (In Re Equip. Servs.), 290 F.3d 739, 745 (4th Cir. 2002)

(holding that when words were deleted from the Bankruptcy Code, the Court "must presume that Congress intended what it said when it . . . delete[d]" the words).

Consequently, under the BAPCPA amendments to Bankruptcy Code section 546(c)(2), Congress reserved administrative expense treatment for only a "reclamation" claim asserted by a seller/creditor who failed to provide a written reclamation notice, but whose claim otherwise "qualifies for [administrative expense status] under § 503(b)(9)." See 11 U.S.C. § 546(c)(2); see also First Magnus, 2008 WL 5046596, at *2. Therefore, the Reclamation Claims asserted by the Respondents as well as any other claims asserted as reclamation claims under Bankruptcy Code section 546(c)(1) pursuant to a written reclamation demand, are simply not entitled to administrative expense priority treatment.

Moreover, even if this Court were to look to the pre-BAPCPA version of section 546(c)(2), the Reclamation Claims are not entitled to administrative expense treatment or a junior lien. As emphasized above, under the pre-BAPCPA version of Bankruptcy Code section 546(c)(2), reclaiming creditors were not automatically granted an administrative claim. See In re Child World, 145 B.R. 5, 8

(Bankr. S.D.N.Y. 1992) ("Pursuant to 11 U.S.C. § 546(c)(2)(A) the granting of an administrative priority to a reclaiming seller is conditioned on the court's denial of reclamation."); see also In re Pester Refining Co., 964 F.2d 842 (8th Cir. 1992) "(In this situation, the bankruptcy court does not 'deny reclamation' in recognizing that the reclamation right no longer has value; therefore, the alternative remedies of § 546(c)(2) do not come into play."). Instead, the Court was required to deny the seller's request and grant the seller either an administrative or secure the claim with a lien. See id.; see also 11 U.S.C. § 546(c)(2)(A)-(B) (2004).

This Court never denied the Respondents' reclamation requests.[15] Nor did it enter any order granting the Respondents an administrative claim or a lien to secure their Reclamation Claim. Rather, the only orders entered with respect to reclamation demands -- the Interim and

[15] The Debtors anticipate that some or all of the Respondents may rely on paragraph 5(c) of the Reclamation Procedures Order and argue that "reject[ing]" their Reclamation Demands was tantamount to denying them. Even assuming rejection is equivalent to denial, this argument must fail because paragraph 5(c) expressly provided that the "Debtors", not "the court" as required by pre-BAPCPA section 546(c), "shall be deemed to have rejected the Reclamation Demand." Thus, any reliance on paragraph 5(c) and "the Debtors" deemed rejection of the Reclamation Demands would be misplaced.

Final Reclamation Procedures Orders -- (i) did not deny any reclamation demand, (ii) established "procedures for the processing and reconciliation of Reclamation Claims" that permitted the Debtors 120 days to review such demands, and (iii) left claimants with the right to pursue any and all remedies. Reclamation Order ¶¶ 4-5 (emphasis added). More specifically, this Court's Reclamation Order provided that:

> "[n]othing in th[e] Order or the above procedures [for the processing and reconciliation of Reclamation Claims] is intended to prohibit, hinder, or delay any Reclamation Claimant from asserting or prosecuting any of its rights to seek to reclaim goods provided to the Debtors, or affect, alter, diminish, extinguish, or expand the rights or interests, if any, to recover goods (or proceeds thereof) sought to be reclaimed . . . [.]"

See id. ¶ 6.

Consequently, even under pre-BAPCPA section 546(c), in lieu of reclaiming their Alleged Goods, the Respondents would not have been entitled to the alternative remedies of an administrative claim or a junior lien.

C. The Respondents' Failure To Pursue Their Reclamation Rights Also Warrants Reclassifying Their Reclamation Claims To Unsecured Non-Priority Claims.

As set forth above, Bankruptcy Code section 546(c)(1) permitted the Respondents to reclaim their goods,

but only if they made a written reclamation demand. Critically, however, even assuming that the Respondents' written Reclamation Demands were legally proper and sufficient,[16] the Respondents still had a duty to pursue their reclamation claims on a timely basis and with sufficient diligence. See First Magnus, 2008 WL 5046596 at *1-2 (noting that a creditor can lose its reclamation rights by not pursuing its reclamation claim timely and diligently); In re McLouth Steel Prods. Corp., 213 B.R. 978, 987 (Bankr. E.D. Mich. 1997) (finding that the "burden is on the reclamation claimant to further diligently pursue its claim by, for example, filing a motion or complaint for reclamation in bankruptcy court for the goods, or commencing an adversary proceeding"); Tate Cheese Co. v. Crofton & Sons, Inc. (In re Crofton & Sons, Inc.), 139 B.R. 567, 569 (Bankr. M.D. Fla. 1992) (holding that a creditor's failure to diligently pursue its reclamation demand through appropriate judicial channels defeated its right to reclaim goods). As one court recently held, if a reclaiming seller makes a reclamation demand and the debtor does not respond

[16] The Debtors do not waive, and expressly reserve, the right to argue that the Reclamation Demands were not adequate in the event that the Court does not grant the Summary Judgment Motion and proceeds to a trial on the Reclamation Claims.

or never returns the goods, the seller loses its reclamation rights. First Magnus, 2008 WL 5046596, at *2.

In this regard, another court explained that:

> [a] claimant may not be allowed to merely sit on its potential claims awaiting fulfillment, when the debtor has clearly rejected the claim. Again, the Bankruptcy Code is not self-executing, and the bankruptcy courts exist, in part, for the purpose of resolving disputes over entitlement to insolvent debtors' assets, between the insolvent debtors and their various creditors.

McLouth Steel, 213 B.R. at 989.

Here, the Respondents each submitted a Reclamation Demand. None of the Respondents, however, took any action to pursue their goods or provide an explanation justifying their inaction. In fact, none of the Respondents should to lift the automatic stay to reclaim their goods or seek a temporary or preliminary injunction prohibiting the sale of their goods. Nothing, however, precluded the Respondents from doing so, and in fact, the Reclamation Procedures Order made clear that all such rights were preserved and not prohibited. See Reclamation Procedures Order at ¶ 6.[17] Moreover, counsel to the Debtors

[17] For this reason, the Respondents' reliance on Georgetown Steel is misplaced. In Georgetown Steel, the reclamation order provided, in pertinent part, that a creditor was "enjoined" from seeking to reclaim its goods. 318 B.R. at 349. The reclamation order also provided that a reclamation claim allowed by the court would be *(cont'd)*

made clear that such actions could be taken. See Transcript of Hearing held Nov. 10, 2008 at p. 84 (Debtors' counsel stating that if reclamation claimants wanted "to get [a] TRO and injunction in an adversary proceeding, . . . [the proposed Reclamation Procedures Order] doesn't preclude them from doing it"); see also Transcript of Hearing held Dec. 5, 2008 at p. 62-63 (D.I. 942)(Debtors' counsel stating that if reclamation claimants were not "comfortable with these procedures, then . . . [such claimants were] entitled to file a lawsuit, a request for a stay, [or] a temporary injunction").

Furthermore, although at least one of the Respondents contends that it failed to take further action because the Debtors failed to respond to its Reclamation Demand, that fact does not justify the Respondent's inaction. See Crofton & Sons, 139 B.R. at 569 (holding that a creditor's failure to diligently pursue its reclamation demand through appropriate judicial channels

(cont'd from previous page)
"deemed an administrative expense claim in accordance with Section 546(c) of the Bankruptcy Code." Id. As set forth above, neither of those facts is present here, and the Debtors are not equitably or judicially estopped from arguing that reclamation creditors were not entitled to administrative expenses, as were they in Georgetown Steel. Id.

defeated its right to reclaim goods); See First Magnus, 2008 WL 5046596, at *2 (denying administrative expense status and reclassifying a reclamation claim to a general unsecured claim because the reclaiming seller failed to timely and appropriately pursue its reclamation rights); McLouth Steel, 213 B.R. at 989-90 (reversing the bankruptcy court's award of administrative priority because the reclaiming sellers failed to timely and appropriately pursue their reclamation claims).

Accordingly, for this reason as well, the Reclamation Claims should be reclassified to pre-petition general unsecured, non-priority claims.

III. THE RECLAMATION CLAIMS ARE ALSO GENERAL UNSECURED, NON-PRIORITY CLAIMS BECAUSE THE GOODS WERE SUBJECT TO THE PRE-PETITION AND DIP LENDERS' FLOATING LIENS ON INVENTORY.

In pursuing their requests for administrative claims or junior liens, the Respondents also ignore other newly added language in Bankruptcy Code section 546(c)(1) by BAPCPA, certain indisputable facts present in these cases, and the nature of the reclamation remedy.

Specifically, prior to the BAPCPA amendments to section 546(c), courts were split as to whether the so called "prior lien defense" could be used to deny a

reclaiming seller "an administrative claim or a lien on property of the debtor's estate . . . ." Dana, 367 B.R. at 415. A majority of courts applied the defense and had held that a reclamation claimant was not entitled to an administrative claim or lien if a lender had a floating lien on all of the debtor's inventory and the value of lender's claim exceeded the value of the inventory sought to be reclaimed. See, e.g., In re Pester Refining Co., 964 F.2d 842, 847 (8th Cir. 1992) ("[W]hen the secured creditors have satisfied their claims out of the goods to be reclaimed, granting § 546(c)(2) relief [an administrative claim or a junior lien] would afford the reclamation seller something it does not have under the UCC -- a priority interest in the buyer's assets other than the goods to be reclaimed.").[18]

Nonetheless, a minority of courts held otherwise. See, e.g., Phar-Mor, 534 F.3d at 508 (finding that the plain language of the pre-BAPCPA section 546(c) provided

[18] See also In re Dairy Mart Convenience Stores, Inc., 302 B.R. 128, 134 (Bankr. S.D.N.Y. 2003) ("When goods subject to a reclamation demand are liquidated and the proceeds used to pay the secured creditor's claim, the reclaiming seller's subordinated right is rendered valueless."); Galey & Lord Inc. v. Arley Corp. (In re Arlco, Inc.), 239 B.R. 261, 273 (Bankr. S.D.N.Y. 1999) ("When the secured claim, or a portion of it, is paid out of the goods sought to be reclaimed, the right to reclaim is rendered valueless.").

the reclaiming seller with administrative expense priority); Georgetown Steel, 318 B.R. at 351–52 (same).

In the BAPCPA amendments, however, the phrase "subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof" was inserted into the introductory paragraph of section 546(c)(1). By so doing, Congress adopted the majority view and expressly provided that a senior lender's pre-petition and post-petition liens are superior to the rights of all reclaiming creditors. See Simon & Schuster, Inc. v. Advanced Mktg. Servs. (In re Advanced Mktg. Servs.), 360 B.R. 421, 429 (Bankr. D. Del. 2007) ("Under the express language of § 546(c)(1) of the Bankruptcy Code, as amended, [a senior lenders'] pre-petition and post-petition liens on [a debtor's] inventory are superior to a reclamation claim."). And, Congress expressly accepted the "prior lien defense" and eliminated the need to interpret state law to determine whether a pre- or post-petition lender was a "good faith purchaser for value" or "buyer in the ordinary course of business." See id. (concluding that, under the Bankruptcy Code, as opposed to state law, reclamation rights were valueless because the lenders had floating liens on the debtor's inventory).

Here, the Pre-petition Lenders and the DIP Lenders held floating liens on all of the Debtors' inventory, including the Alleged Goods, and the proceeds thereof. See supra at pp. 6-8. Consequently, under Bankruptcy Code section 546(c)(1), the Pre-petition Lenders' and the DIP Lenders' rights were superior to the Respondents' reclamation rights, if any. Accordingly, the Respondents' Reclamation Claims are valueless and, thus, not entitled to anything other than a pre-petition general unsecured non-priority claim. See Dana, 367 B.R. at 421 (holding that "the Reclamation Claims are valueless as the goods remained subject to the Prior Lien Defense."); Dairy Mart, 302 B.R. at 136 (holding that "the goods or their proceeds have effectively been 'paid' to the secured creditor, and the Reclamation Claims in those goods is valued at zero.").

Nor does it matter, that on November 12, 2008, the Pre-petition Lenders were paid in full by the DIP Lenders and released their liens in favor of the DIP Lenders' liens on the same collateral. Indeed, on nearly identical facts, the bankruptcy court in Dana concluded that reclamation rights were nonetheless valueless.

Specifically, in Dana, the pre-petition lenders held floating liens on the debtor's equipment, inventory, and other assets and the pre-petition lenders were oversecured. Dana, 367 B.R. at 412. After the debtor filed bankruptcy, the court approved a debtor in possession financing facility under which the debtor was authorized to (and over a short period did) repay the pre-petition lenders in full and granted the post-petition lenders liens on what was formerly the pre-petition collateral and the proceeds thereof. Id.

Relying on the fact that the "lien chain continued unbroken", the court found that the goods sought to be reclaimed were "effectively disposed of" by liquidating them in satisfaction of the pre-petition indebtedness or pledging them to the DIP lenders as collateral. Dana, 367 B.R. at 421. Moreover, none of the reclamation claims were greater than the amount of the outstanding pre-petition or post-petition secured debt. Id. "Accordingly, the Reclamation Claims [were] valueless as the goods remained subject to the Prior Lien Defense." Id.; see id. at 420 ("I)f the value of any given reclaiming supplier's goods does not exceed the amount of debt secured by the prior lien, that reclamation claim is valueless.").

Similarly, here, the Pre-petition Lenders held floating liens on the Debtors' inventory, including the Alleged Goods, and proceeds thereof. On the Petition Date, this Court approved the DIP Facility under which the Debtors repaid the Pre-petition Lenders in full. In addition, the Court granted the DIP Lenders senior liens on, among other property, all of the Debtors' inventory and proceeds thereof. Thus, the lien chain was unbroken and the Alleged Goods were disposed of by using them to satisfy the obligations owed to the Pre-petition Lenders and pledging them as collateral for the obligations owed to the DIP Lenders. See supra at pp 6-8. Consequently, under Bankruptcy Code section 546(c)(1), the Respondents' reclamation rights were subject to the prior lien defense, and since the Reclamation Claims were neither separately or collectively greater in value than the outstanding amount due to the Pre-petition Lenders or the DIP Lenders, the Reclamation Claims are valueless as anything other than pre-petition general unsecured, non-priority claims.

Certain Respondents also contend that even though the Debtors no longer have possession of the Alleged Goods, the Respondents are entitled to a security interest in the proceeds of the Alleged Goods specified in their

Reclamation Demands.[19] This assertion should also be rejected.

A seller's right to reclamation is an in rem remedy. See Dana, 367 B.R. at 419 (noting that reclamation is an in rem remedy); see also In re Pluma, Inc., 2000 WL 33673751, at *3 (Bankr. M.D.N.C. July 21, 2000) (noting that reclamation is an in rem right). As such, a seller only has the right to reclaim the goods, not the proceeds thereof. Arlco, 239 B.R. at 274 (noting that a reclaiming seller is not a secured creditor and does not have a security interest in reclaimed goods or a secured claim from the proceeds thereof). Indeed, the Respondents can no more properly request that they be paid an administrative expense from proceeds of the sale of inventory or a lien on such proceeds, as they could require a lender to marshal assets for their individual benefit. See Advanced Mktg. Servs., 360 B.R. at 427 (holding that reclamation creditors are unsecured creditors who cannot invoke the equitable doctrine of marshaling). Consequently, any such request

[19] See LumiSource Response at p. 2; Plantronics Response at p. 2; Cisco-Linksys Response (D.I. 4120) at p. 2; Seagate Response (D.I. 4115) at p.2.

with respect to the cash proceeds of the inventory sales should also be denied as a matter of law.

Thus, for the foregoing reasons, under Bankruptcy Code section 546(c)(1), the prior lien defense applies and the asserted administrative or secured claims of the Respondents are valueless as anything other than pre-petition general unsecured, non-priority claims, if they exist at all.

CONCLUSION

For the reasons set forth herein, the Debtors respectfully request that this Court grant summary judgment and reclassify the Reclamation Claims to general unsecured, non-priority claims.

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